Supreme Court, U.S.
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No.

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In The Supreme Court of the United States

INTERNATIONAL FIDELITY INSURANCE COMPANY, AS SURETY,

Petitioner,

v.

STATE OF NEW JERSEY (COUNTIES OF BERGEN AND PASSAIC)

On Petition for Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTION PRESENTED FOR REVIEW

Rule 3:26 of the Rules Governing the Courts of New Jersey sets forth, in several separate subparts, the criteria for bail for criminal defendants. *Rule* 3:26-6, which addresses bail forfeiture, was revised in 1998 to modify the manner in which a forfeiture of bail could be declared and then enforced. The revised *Rule* 3:26-6(c) concerns the enforcement of a declaration of bail forfeiture and the manner in which a default judgment may be entered. The question presented is:

Whether *Rule* 3:26-6(c), as written or as interpreted by the courts of the State of New Jersey denies due process of law to this Petitioner and to others similarly situated in violation of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The Petitioner, International Fidelity Insurance Company, by and through its General Agent, Capital Bonding Corporation, was the surety involved in five separate proceedings below, which were consolidated by the Court. The party that initiated the proceedings below is the State of New Jersey, the Respondent in this action.[1]

The individual criminal defendants for whom bail was initially posted have not been named in this Petition since they did not participate below. Those individuals were, however, named in the court whose judgment is sought to be reviewed as follows: Roni Polanca a/k/a Andy Rivera, Dennis Kasey, Fidel Bravo, Jose O. Rodriguez, and Valeria Rodriguez.

RULE 29 DISCLOSURE

There is no parent corporation or publicly held company that owns ten percent or more of

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[1] Of the five actions initially consolidated by the Superior Court of New Jersey, Appellate Division, only two remain. Since the time of the initial Petition for Certification to the New Jersey Supreme Court in this matter, two of the individual defendants were apprehended as a result of the efforts of the Petitioner and surrendered to the appropriate Counties. A third individual defendant was apprehended as a result of the efforts of the Petitioner, and is presently being held in federal custody. Since the individual defendants in those matters were apprehended, the matters were able to be resolved by and between the Petitioner, the State and the counties involved.

the stock of International Fidelity Insurance Company or of Capital Bonding Corporation.

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In The Supreme Court of the United States

INTERNATIONAL FIDELITY INSURANCE COMPANY, AS SURETY,

Petitioner,

v.

STATE OF NEW JERSEY (COUNTIES OF BERGEN AND PASSAIC)

On Petition for Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division

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PETITION FOR RELIEF

The Petitioner, International Fidelity Insurance Company, as Surety, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of the State of New Jersey, Appellate Division.

OPINIONS BELOW

The determination of the New Jersey Superior Court, Appellate Division, dated June 7, 2000 (App., *infra*, 1a-13a), was issued in the form of a written opinion and is reported at *State (County of Bergen) v. Polanca*, 753 *A.2d* 1170, 1173 (N.J. Super. Ct. App. Div. 2000). The New Jersey Supreme Court denied the subsequent Petition for Certification, by Order dated October

17, 2000 (App., *infra,* 14a), which denial is reported at *State (County of Bergen) v. Polanca,* 762 *A.2d* 219 (N.J. 2000). The New Jersey Supreme Court also denied the motion for reconsideration of its earlier denial of the Petition for Certification by Order dated January 9, 2001 (App., *infra,* 15a), which order is unreported.

STATEMENT OF JURISDICTION

The Opinion of the New Jersey Superior Court, Appellate Division, was entered on June 7, 2000. The New Jersey Supreme Court denied a timely Petition for Certification, on October 17, 2000. On January 9, 2001, the New Jersey Supreme Court subsequently denied a timely motion for reconsideration of its earlier denial of the Petition for Certification.

The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend XIV.

STATEMENT OF THE CASE

International Fidelity Insurance Company, the Petitioner ("Petitioner"), is a corporate surety authorized to underwrite bail bonds in the State of New Jersey. The Petitioner is only one of a number of sureties that post numerous bail bonds in the State of New Jersey, and other states throughout the nation, each year.

In this case, the Petitioner properly posted bail bonds pursuant to the Rules Governing the Courts of New Jersey.

This Petition arises as a result of a determination of the New Jersey Superior Court, Appellate Division ("Appellate Division") in five consolidated cases. The Appellate Division rejected the Petitioner's contention that the five judgments of forfeiture previously entered in the New Jersey Superior Court, Law Division, were entered in violation of the Petitioner's right to due process. The Appellate Division concluded in the consolidated cases that the judgments had been entered in accordance with the provisions of *Rule* 3:26-6 of the Rules Governing the Courts of New Jersey, which concerns the enforcement of bail forfeiture and the manner in which a default judgment may be entered. (App., *infra*, 8a) The Appellate Division further concluded that *Rule* 3:26-6 satisfied the requirements of procedural due process. (App., *infra*, 9a)

In each of the five consolidated cases, the Petitioner properly posted a bond for a defendant charged with criminal conduct, who later allegedly failed to appear in court as and when

required.[2] First, on April 10, 1998, the Petitioner posted a $100,000 bond to secure the release of Jose Rodriguez on complaints for possession and distribution of a controlled dangerous substance in a school zone. PMA29[3] Then, on May 2, 1998, the Petitioner posted a $100,000 bond to secure the release of Roni Polanca on a complaint for possession of cocaine with intent to distribute. PMA26 After those bonds were posted, it has been alleged that both of the defendants failed to appear in Court.

The New Jersey Superior Court, Law Division (Criminal) ("Law Division"), in both Bergen County and Passaic County ordered the forfeiture of each bond and issued a bench warrant for each defendant, with notice to the surety. PMA1 The Petitioner does not object to the fact that the Courts below declared the bonds forfeited without advance formal notice to any party. The Rules Governing the Courts of New Jersey permit this procedure.

Instead, the Petitioner challenges the manner in which the Courts enforced each such forfeiture. In each case, the Petitioner timely filed written notice of objection to the forfeiture and the entry of default, and a request for additional time within which to surrender the criminal defendants. PMA31-47 Neither the County nor the State filed any objection to the

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[2] As noted previously, of the original five consolidated cases, only two remain (See footnote 1, supra).

[3] "PMA" refers to the Petitioner's Motion Appendix, which is the appendix of the Motion for Stay Pending Appeal, filed by Petitioner simultaneously with Petition for Certification below. The number corresponds to the page number in that Appendix.

Petitioner's requests for relief in any of the five consolidated cases.

The Courts below denied the Petitioner's requests to stay the entry of default and to provide additional time within which to locate and surrender each criminal defendant.

Then, without any papers being filed by the County Counsel of the relevant counties in these contested cases, the Law Division, on its own motion, entered judgment of default in each matter. PMA2-3

HOW THE FEDERAL QUESTION WAS PRESENTED

Initially, the question of whether *Rule* 3:26-6(c) of the Rules Governing the Courts of New Jersey, denies due process of law to this Petitioner and to others similarly situated was raised by counsel for the Petitioner in the bail forfeiture hearings in the Law Division (held on January 29, 1999 in the *Rodriguez* matter and on February 17, 1999 in the *Polanca* matter).

In the *Rodriguez* matter, counsel for the Petitioner briefed the issue of due process prior to the initial hearing in the bail forfeiture matter and then stated during oral argument that

> ...there is no notice of motion filed by any entity, the county or the state, with respect to these matters. It simply provides, Judge, if after 45 days there's no written objection, we're going to enter a default judgment...Judge, I don't believe that that even meets with the minimum requirements of due process.

1T8-11 to 16.[4]

The New Jersey Superior Court, Law Division, Criminal Part, Passaic County, explained that

> Regarding the constitutionality issue, as I indicated, I'm not even so sure I have jurisdiction to talk about the constitutionality of the rule. It's promulgated by the Supreme Court.
>
> . . .
>
> In the alternative, if I did have jurisdiction, you look to whether the rule or the statute...comports with due process requirements...I think I can take judicial notice that there have been enormous outstanding monies from bails that have been forfeited...
> And this problem has been addressed...in the last couple of years by committees and by criminal division managers who made recommendations to the Supreme Court and as a result of those recommendations this rule was promulgated to be effective September 1, 1998.
> It certainly allows for notice...
>
> . . .
>
> I just don't see where, number one, I should be overruling the constitutionality or deciding the constitutionality of a rule;

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[4] This reference is to the transcript of the *Rodriguez* bail forfeiture hearing in the New Jersey Superior Court, Law Division, Criminal Part, Passaic County. In this instance, the citation is to page 8, lines 11 through 16 inclusive. This particular citation format will be followed throughout the Petition.

> but, in the alternative, I do not see where the rule in any way violates due process.

1T18-15 to 21-5.

Similarly, in the *Polanca* matter, counsel for the Petitioner briefed the issue of due process before the initial hearing in the bail forfeiture matter, and then followed up the brief by explaining during oral argument that

> The Fourteenth Amendment to the United States Constitution provides that, (as read).
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor deprive any person of life, liberty or property, without due process of law.

2T7-14 to 19.[5] Petitioner's Counsel further explained during oral argument that

> a bond...is no different than any other contractual obligation that a surety or any other entity may have, and it's entitled to the same modicum of procedure of due process that any other action, albeit civil or be it criminal, are entitled to.
>
> ...the rules [sic] is deficient is for several reasons. First of all, the rule requires that the court act on its own motion, not the motion of the County who has the interest to enter default judgment against the

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[5] This reference is to the transcript of the *Polanca* bail forfeiture hearing in the New Jersey Superior Court, Law Division, Criminal Part, Bergen County. In this instance, the citation is to page 7, lines 14 through 19 inclusive. This particular citation format will be followed throughout the Petition.

> party...when you think of the procedures of due process, we have to indicate what level of procedural due process is the surety entitled to? I would submit that the present process...is deficient.

2T8-4 to 20 Petitioner's Counsel concluded his argument in *Polanca* by explaining to the Court that bail forfeiture matters are

> contract actions and prior rule provided for the notice and opportunity to be heard that comported with procedural due process and comported with the constitutional provisions...Civil forfeitures and criminal forfeitures are both provided with the due process that is set forth in the constitution as well as the rules...

2T23-10 to 16

The New Jersey Superior Court, Law Division, Criminal Part, Passaic County, explained that

> these are professional regulated industry people, we are not talking about a nieve [sic] person, but rather these are regulated insurance companies, know their obligation under the law, and they realize and they underwrite surety bonds, what is going to take place. I think that the due process is followed...Therefore the motion that the rules adopted by the Court are unconstitutional is denied.

1T30-8 to 31-6

Thereafter, in the briefs submitted to the New Jersey Superior Court, Appellate Division, in both cases, the Petitioner raised and argued

the point that the entry of the judgment below violated the Petitioner's right to due process.[6]

After considering the matter, the Appellate Division, determined that "[t]here can be no dispute that a corporate surety...is entitled to both a pre-deprivation hearing and a post-deprivation hearing under the rule". (App., *infra*, 10a) The Appellate Division also explained that

> both the pre-and post-deprivation hearings afforded the surety the right to be exonerated if it produces or has produced the defendant...To that degree, there can be no dispute the rule affords a bond surety an opportunity to be heard at a meaningful time and in a meaningful manner. The rule consequently meets the minimum requirements of due process because it affords both notice and a reasonable and continuing opportunity to be heard.

(App., *infra*, 11a)

The New Jersey Supreme Court did not address the due process issue, as it declined to grant certification. It subsequently denied a timely filed motion for reconsideration.

REASONS FOR GRANTING THE WRIT

The Appellate Division acknowledged that both pre-deprivation and post-deprivation hearings were required for the enforcement of a judgment of bail forfeiture. Having done so, the

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[6] The arguments are found at Point V of the initial *Rodriguez* brief filed with the Appellate Division and at Points I and III in the initial *Polanca* brief filed with the Appellate Division.

Appellate Division erred in approving an interpretation of the relevant rule that requires only a post-deprivation hearing.

Such an outcome contradicts the Court's own assessment of the mandates of due process and cannot be reconciled with the available precedents.

In New Jersey, *Rule* 3:26 of the Rules Governing the Courts of New Jersey is comprised of seven individual subparts pertaining to bail.

Rule 3:26-6, pertaining to forfeiture, is the *Rule* in issue in this case. That rule was modified in 1998 after recommendations of an Ad Hoc Committee on Bail Forfeiture. The rule was altered in an effort to improve, make uniform, and streamline the bail forfeiture process.

The Petitioner certainly has no objection to these laudable goals, but asserts that the manner in which *Rule* 3:26-6 is now being interpreted and applied violates its due process rights and those of similarly situated individuals and entities.

Prior to the 1998 revision, *Rule* 3:26-6(a) read as follows:

> (a) Declaration. Upon breach of a condition of a recognizance, **the prosecuting attorney shall move the court** for a declaration of forfeiture of the bail, and the clerk of the court shall forthwith send notice of the forfeiture to the county counsel or the municipal attorney, as appropriate, who shall forthwith proceed to collect the forfeited amount. [emphasis added]

After the 1998 revision, *Rule* 3:26-6(a) reads:

> (a) Declaration; Notice. Upon breach of a condition of a recognizance, the court **on its own motion** shall order forfeiture of the bail, and the criminal division manager shall forthwith send notice of the forfeiture to county counsel, the defendant, and the surety. The notice shall direct that judgment will be entered as to any outstanding bail absent a written objection seeking to set aside the forfeiture, which must be filed within 45 days of the date of the notice. [emphasis added]

Under the revised section (a), the procedure for obtaining a declaration of forfeiture no longer requires a formal motion by the prosecuting attorney. In the instant case, in keeping with the change in *Rule* 3:26-6(a), the Law Division, on its own motion, ordered forfeiture of the bail and sent notice to the surety, to which the surety timely filed an objection. The Petitioner does not challenge the procedure followed by the Court with regard to the declaration and notice provisions of section (a).

Instead, Petitioner questions the manner in which the courts have interpreted section 3:26-6(c), since the interpretations below contradict due process requirements. Before the 1998 revision, *Rule* 3:26-6(c) read as follows:

> (c) Enforcement; Remission. When a forfeiture is not set aside, the court shall **on motion** enter a judgment of default and execution may issue thereon. After entry of such judgment, the court may

remit it in whole or in part in the interest of justice. [emphasis added]

Now, *Rule* 3:26-6(c) provides:

(c) Enforcement; Remission. When a forfeiture is not set aside or satisfied, the court shall, upon expiration of the 45 days provided for in paragraph (a), **summarily** enter a judgment of default for any outstanding bail and execution may issue thereon. After entry of such judgment, the court may remit it in whole or in part in the interest of justice. In any contested proceeding, county counsel shall appear on behalf of the government. **County counsel shall be responsible for collection of forfeited amounts**. [emphasis added]

In the earlier case of *State v. Causey*, the New Jersey Court explained that, under the former rule,

no notice of court dates or of forfeitures was due the surety prior to the motion for judgment on the forfeitures...Our relevant court rule, *R.* 3:26-6(a), simply states that "[u]pon breach of a condition of a recognizance, the prosecuting attorney shall move the court for a declaration of forfeiture of the bail..."

R. 1:13-3(b) regulates the contents of the form as follows:

Contents. All surety and bail bonds given in any court shall provide that the principal and surety thereby submit themselves to the jurisdiction of the court...that they irrevocably appoint the clerk of the court having jurisdiction as

> their agent upon whom papers affecting their liability on the bond may be served... that the liability of the principal and surety may be enforced **by motion in the action**, if one is pending, without the necessity of an independent action... The rule was designed to clarify the surety's obligation which may be enforced by summary proceeding even if no action is pending. [emphasis added]

State v. Causey, 463 *A.2d* 352, 356 (N.J. Super. Ct. App. Div. 1983). The Court in *Causey* also explained that the general view was that "a forfeiture proceeding is more in the nature of a judicial declaration than a judgment and is preliminary to enforcement proceedings. See 8 *Am.Jur.2d*, Bail and Recognizance, § 145 at 685 (1980)." *Causey*, 463 *A.2d* at 357.

Plainly, then, the Courts have long recognized the distinction between the declaration of forfeiture and the subsequent enforcement proceedings.

The Comments to *Rule* 3:26-6(a) explain that (a) was amended in 1998 "to authorize the court, on its own motion, to order forfeiture" rather than having the prosecutor move for a declaration of forfeiture. As a result, a defendant has the opportunity to object to the forfeiture only after the order has been entered. Pressler, *Current New Jersey Court Rules*, Comment *R.* 3:26-6(a) (Gann).

The Comments to subsection *Rule* 3:26-6(c) explain that (c) was likewise amended in 1998 in implementation of the change to subsection (a) "requiring, **in a contested proceeding, that county counsel represent**

the government and **be responsible for collection**. [emphasis added]" Pressler, *Current New Jersey Court Rules*, Comment *R.* 3:26-6(c) (Gann). The *Rule* and the Comments thereto thus clearly state that the County Counsel in each county *shall* be responsible for collection of the forfeited amounts, suggesting that some affirmative action by the County Counsel is required.

There was no affirmative action by County Counsel in the Law Division in this case. Instead, the Court itself entered a judgment of forfeiture without any request, in the form of a motion or otherwise, by any party. The Court entered the judgment on its own motion.

A. The Decision of the Appellate Division Conflicts with its Own Due Process Analysis.

The State, the counties, and the Courts below have taken the position that "summarily" in the new *Rule* 3:26-6(c) is the equivalent of "on its own motion" in the new *Rule* 3:26-6 (a).

The Petitioner asserts that a reading of *Rule* 3:26-6(c) that allows the Court to enter judgment on its own motion, in a contested case, without any papers filed by, or any affirmative showing made by *any party*, violates the requirements of due process. The Petitioner maintains that "summarily" and "*sua sponte*" are not equivalent terms, and that to treat them as such violates due process.

The Courts below have interpreted the Law Division's ability to enter an initial *order* declaring forfeiture *sua sponte* to mean that it may also enter *judgment* that way, permitting

enforcement in the absence of any supporting motion.

The Petitioner posits that in a contested case, where a surety timely files a written objection to forfeiture, due process requires that the Court await a filing for default judgment by the county counsel's office or some other proper entity before the it may, in a summary manner, consider the case and enter judgment as appropriate.

If the intention of *Rule* 3:26-6(c) was to permit the court to enter a judgment (rather than simply an order declaring forfeiture) *sua sponte*, the Petitioner questions why the *Rule* would not simply say "*sua sponte*" or "on its own motion" rather than "summarily", particularly since such language was included quite deliberately in section (a). Instead, the plain language of the rule itself, and the Comments to the rule note that in a contested proceeding, county counsel shall represent the government and be responsible for collection. *See*, Pressler, *Current New Jersey Court Rules*, Comment *R.* 3:26-6(c) (Gann). In this case, however, county counsel filed no papers below and took no action to collect the funds sought. Instead, the Court unilaterally entered the defaults.

The New Jersey courts may have interpreted the 1998 change in *Rule* 3:26-6(c) as absolving the State and the counties from all affirmative efforts to collect forfeited bail monies. It must be noted that the action taken by the Court in this case is unprecedented and differs considerably from other actions permitted by the Rules Governing the Courts of New Jersey to be taken by a court *sua sponte* or "on its own

motion".[7] In addition, when the courts consider other summary-type actions, such as motions for summary judgment, summary dispossession, summary support, default judgment, criminal forfeiture, injunctions and restraining orders, the standard form of motion practice is followed. In none of those cases does the court first enter an order, then unilaterally enter judgment, and then collect funds, all without any action by a party. To proceed in that manner is to deny due process to the party against whom the judgment is entered.

The requirements of due process are articulated in the United States Constitution and in the case law decided pursuant thereto. The Appellate Division looked to decisions of the United States Supreme Court to determine those requirements.

> This Court has previously determined that "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." ...'(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' ...[citations omitted]

Mathews v. Eldridge, 424 *U.S.* 319, 334 (1976). The Court further explained in *Matthews*, that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official

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[7] The Petitioner included a detailed listing of such actions in its Petition for Certification filed below (pp. 7-8) and in its Brief in support of its Motion for Stay Pending Appeal (pp. 13-15).

> action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. "Applying this test, the Court usually has held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property." *Zinermon v. Burch,* 494 U.S. 113, 127 (1990). Likewise, the New Jersey Supreme Court has explained that "[i]n examining a procedural due process claim, we first assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient." *Doe v. Poritz,* 662 *A.2d* 367, 417 (N.J. 1995).

"State law may provide relief beyond the demands of federal due process...but under no circumstances may it confine petitioners to a lesser remedy..." *Harper v. Virginia Dept. of Taxation,* 509 *U.S.* 86, 102 (1993).

In ascertaining the nature and extent of the process that must be provided to this Petitioner before it may be deprived of property, the relationship between the parties must be considered. A bail bond represents a contract between the surety and the State. See, *State v. Mercado,* 747 *A.2d* 785, 788 (N.J. Super. Ct. App. Div. 2000). As a result of its contract with

the State, the Petitioner is entitled to due process before it must pay over any funds.

There are few cases interpreting *Rule* 3:26-6, and none directly on point.

The Petitioner noted below that the counterpart Federal Rule reads as follows:

> (e) Forfeiture.
> (1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.
> (2) Setting Aside...
> (3) Enforcement. When a forfeiture has not been set aside, the court shall **on motion enter a judgment of default** and execution may issue thereon...[the]... liability may be enforced on motion without the necessity of an independent action...[emphasis added]

Fed.R.Crim.P. 46(e).

The Petitioner suggests that the Federal rule, like the State rule, calls for an initial step that may be taken by the Court unilaterally, and a second step that requires action by the government, and notice to the surety. Of the few cases interpreting the federal rule, *United States v. Lacy*, 778 *F.Supp.* 1137 (D. Kansas 1991) is instructive. There, the government failed to provide notice to the surety of a motion to enforce a forfeiture, but argued that its failure should not preclude the entry of a judgment. The government asserted that because it had submitted an amended judgment for bond forfeiture referencing its motion for judgment against the surety to the Clerk, that submission constituted an oral motion that complied with the spirit of the relevant rule. The government

further asserted that since the surety knew that the defendant had failed to appear court as and when required, it knew that a judgment would ultimately be entered against it. The Court explained that while

> the United States' arguments are imaginative, in the final analysis the court is compelled to conclude that American Bankers did not receive adequate notice of the government's motion for judgment. **The government's interpretation essentially reduces the notice requirement of *Rule* 46 to a nullity. Accepting the government's arguments would also seemingly violate due process, the essence of which is embodied in *Rule* 46...**[emphasis added]

United States v. Lacy, 778 *F.Supp.* 1137, 1140-1141 (D. Kansas 1991); See also, Wright & Miller, 3A *Federal Practice & Procedure Criminal 2d*, Sec. 776 (2000 Pocket Part).

Having considered this Petitioner's arguments on appeal from the Law Division judgments, the Appellate Division determined that "[t]here can be no dispute that a corporate surety...is entitled to both a pre-deprivation hearing and a post-deprivation hearing under the rule". (App., *infra*, 10a) To ascertain the extent of the due process to which it is entitled, the Petitioner looks for reference to the definition of "hearing" as is commonly used, referring to a

> proceeding of relative formality...generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented. It is a proceeding where evidence is taken to determine issue

> of fact and to render a decision on the basis of that evidence...The parties proceeded against or otherwise involved have right to be heard, in much the same manner as a trial and such proceedings may terminate in final order.

Black's Law Dictionary (7th ed. 1999). To the Petitioner, then, a 'hearing' means an opportunity to be present in Court, with or without the presence of an adversary, to present its case, and have the Court render a decision.

Under the *Rule* as presently interpreted, the Petitioner is *not* afforded a pre-deprivation hearing and is thus deprived of due process.

Rule 3:26-6 facilitates the interests of the State and the counties in collecting monies resulting from bail forfeitures, but it should not be permitted to do so at the expense of the Petitioner. The State may achieve its goal without undue impediment or delay, and without a denial of due process. The Petitioner does not seek the imposition of new procedural requirements, but asks that the Court recognize the distinction between *Rule* 3:26-6(a) and (c) so that it is not denied the necessary protections.

The Appellate Division described the Petitioner as a "private interest" accepting certain risks for economic benefit. (App., *infra.*, 11a) In response, the Petitioner asserts that it understood that it would have notice and an opportunity to participate in any summary proceeding to enter judgment. [8]

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[8] It is noted, and was brought to the attention of the Court below, that the contract between the parties to this action calls for enforcement of the surety's liability by

The interpretation of the rule approved by the Appellate Division, however, calls for a single notice of the declaration of the forfeiture, without any meaningful opportunity for the Petitioner to be heard. Although the Courts below interpreted the rule to allow for a *written* objection by the Petitioner, if the Court is permitted to enter judgment *sua sponte*, the rule does not afford the Petitioner any hearing at which it may present its case. This represents both a sharp contrast to the prior practice and a deprivation of the requisite due process.

Superficially, these two cases present somewhat difficult circumstances under which to analyze and address the issue in question. The reason for the difficulty is that, as noted previously, there was, in fact, a hearing in the Law Division in each of these cases at which time the parties appeared in Court.

It must be noted, however, that the hearing resulted solely from the motion of the Petitioner, and not from any action by County Counsel.

Had the Petitioner not filed its motion, it is respectfully suggested that there would have been no motion filed by anyone. The Petitioner

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motion. The plain language of the contract between this surety and the State says:

> It is further agreed that the liability of the surety may be enforced **on motion** without the necessity of an independent action, and that such motion and notice of motion may be served on the Clerk of the Court, who shall forthwith mail copies to the surety at the address given in the bond, and this shall be deemed sufficient notice to the surety. [emphasis added]

respectfully asks that a 'fortuitous' hearing at its own request not preclude this Court from addressing the critical question of whether the State and the counties should be allowed to proceed to judgment in the absence of any motion.

The Petitioner respectfully suggests that such a practice is in contravention of the language of the rule, and, specifically, that a motion and hearing are required before judgment may be entered.

In light of the published opinion on this matter, and the New Jersey Supreme Court's decision not to grant certification, the practice of Courts entering judgments in forfeiture matters in the Law Division on their own motion has become commonplace throughout the State.

In this case, which is interpreted as supporting such a practice, the Appellate Division actually acknowledged that both pre-deprivation and post-deprivation hearings were required. Contrary to its own analysis, it then approved a reading of the *Rule* that required only a post-deprivation hearing, in violation of due process. As noted above, the Appellate Division stated that "[t]here can be no dispute that a corporate surety...is entitled to both a pre-deprivation hearing and a post-deprivation hearing under the rule." (App., *infra*, 10a) The Court went on to explain, however, that

> [o]n one hand it is given **notice** that a forfeiture has been declared due to the failure to present the defendant at a stage of the criminal proceedings covered by its bond. At that point, it has been deprived of no property. On the other hand, **even**

> **after the default forfeiture judgment is entered**, a point at which it is subject to the potential loss of property, **it has an opportunity for a hearing** to secure a remission of its obligation and, consequently, a vacation of any default judgment. Thus the rule affords avenues which engender prevention of a wrongful deprivation. [emphasis added]

(App., *infra*, 10a-11a).

Thus, immediately after it determined that the Petitioner is entitled to both pre- *and* post-deprivation hearings, the Appellate Division approved a scenario in which the Petitioner is afforded only pre-deprivation notice (*not* a hearing) and then *only a post-deprivation hearing.*

The Appellate Division's interpretation of the rule calls for a single *notice* of the declaration of the forfeiture, after which the Petitioner may file a written objection. If the Petitioner elects to do so, then, according to the Appellate Division's reading of the rule, there is no requirement that county counsel, or anyone else, file anything in response or support of the judgment. The Petitioner, then, will file an objection to the entry of the forfeiture, which the Court will then consider, or not, as it chooses. If *Rule* 3:26-6(c) permits the Court to enter judgment *sua sponte*, the Judge may, according to this reading of the rule, simply sign the order of forfeiture in chambers, or on the bench, disposing of the matter without any pre-deprivation hearing after the 45 days has elapsed.

Such a result is to be anticipated because if "summarily" in *Rule* 3:26-6(c) really means "*sua sponte*", then there is no requirement for a hearing contained anywhere in that section of the rule. If there is no formal requirement for a hearing, there certainly is no guarantee, or even a reasonable likelihood, that there will be a pre-deprivation hearing, except at the sufferance of the Court, which will vary from day to day, judge to judge, county to county.

The Appellate Division specifically found that due process entitled the Petitioner to a hearing, or, more accurately, to two of them. The Petitioner agrees. Reading *Rule* 3:26-6 as the Appellate Division does, however, leaves the Petitioner at without any assurance of any meaningful opportunity to be heard before being deprived of its property, in violation of the acknowledged requirements of due process.

The Petitioner suggests that support for the requirement of a pre-deprivation hearing is found not only in the Appellate Division decision below, but also in the language of *Matthews*. Petitioner notes that with bond amounts in the tens and hundreds of thousands, and in light of the underlying contractual relationship between the State and the Petitioner, there is a substantial private interest involved. Additionally, the risk of erroneous deprivation is great in the absence of a pre-deprivation hearing. Without the protection of such a hearing, forfeitures and defaults are entered after bonds have been discharged, after criminal defendants are already incarcerated, after cases have been resolved by consent, after the Petitioner has already paid, and by mistake.

The clear value of a pre-deprivation hearing is that by requiring the State to provide even a limited amount of factual information in support of its claim to the funds, the risk of erroneous deprivation is significantly reduced at very little cost to the State. Since the rule change eliminated the requirement for any affirmative action by the State or the county before a forfeiture may be declared, the administrative burden on the State has already been reduced by one half. The filing of a single motion is not too great a burden to impose on the State or county in order to protect the Petitioner against the improper deprivation of substantial funds.

B. This Decision is Both Important and Recurring for Individuals and Entities Other than this Petitioner.

The actions and determinations of the Law and Appellate Divisions below represent a dramatic change in the way bail forfeiture cases are handled by the Courts in the State of New Jersey, and a radical departure from the past practice.

Although it is a private business entity, the Petitioner plays a significant role in New Jersey's criminal justice system. The issuance of bail bonds represents not only a business for the Petitioner, but an opportunity for numerous individuals throughout the State to avoid incarceration before any determination of guilt. It also affords a practical means of addressing the volume of crime in New Jersey without adding to the woefully overcrowded prisons and jails statewide.

While this case directly involves one Petitioner and two bonds, the issues to be addressed are not limited to the matters that were consolidated below. In one year alone, the participants in this appeal underwrote more than 5,000 bail bonds totaling approximately $90,000,000 in the State of New Jersey. PMC, p. 4[9] In addition, as a result of the number of times this issue is addressed each year, there are presently numerous cases throughout the State that await the outcome of this action.

At present, the language of the rule and the opinion of the Appellate Division leave room for misinterpretation, and a deprivation of due process. This is particularly true in light of the absence of guidance from the New Jersey Supreme Court.

As a result of the sheer volume of the cases in which bail bonds are posted every year, this case involves a legal issue that will likely arise again and again, presenting a question of general public importance.

In addition, the rule and the procedure in issue apply not only to commercial entities like this Petitioner, but to individuals who post money, property, and their homes, and can ill afford a 'judgment without notice' as a matter of course. These are individuals who do not have the resources to challenge the rule or its

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[9] "PMC" refers to the Petitioner's Motion Certification of Rita Lash, Risk Manager for the General Agent of the Petitioner, which Certification was filed in support of the Motion for Stay Pending Appeal, filed by Petitioner simultaneously with Petition for Certification below. This reference is to the Certification of Rita Lash

interpretation, but will nevertheless be impacted by any determination made thereon.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April 2001

APPENDIX A

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3630-98T2
A-3636-98T2
A-3639-98T2
A-3775-98T5
A-4007-98T5

STATE OF NEW JERSEY
(COUNTY OF BERGEN),

Plaintiff-Respondent,

v.

RONI POLANCA, a/k/a
ANDY RIVERA,

Defendant,

and

INTERNATIONAL FIDELITY
INSURANCE COMPANY, as Surety,

Defendant-Appellants.

STATE OF NEW JERSEY

A-3636-98T2

Plaintiff-Respondent,

v.

DENNIS KASEY,

Defendant,

and

INTERNATIONAL FIDELITY INSURANCE COMPANY, as Surety,

Defendant-Appellants.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FIDEL BRAVO,

Defendant,

and

INTERNATIONAL FIDELITY INSURANCE COMPANY, as Surety,

Defendant-Appellants.

A-3639-98T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE O. RODRIGUEZ,

A-3775-98T5

Defendant,

and

INTERNATIONAL FIDELITY
INSURANCE COMPANY, as Surety,

Defendant-Appellants.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

A-4007-98T5

v.

VALERIA RODRIGUEZ,

Defendant,

and

INTERNATIONAL FIDELITY
INSURANCE COMPANY, as Surety,

Defendant-Appellants.

Argued May 16, 2000 – Decided June 7, 2000

Before Judges Muir, Jr., Wallace, Jr., and Cuff

On appeal from the Superior Court of New Jersey, Law Division, Bergen, Passaic, and Monmouth Counties.

Samuel M. Silver argued the cause for appellant in all appeals.

Steven J. Zweig, Deputy Attorney General, argued the cause for respondent State of New Jersey in all appeals (John J. Farmer, Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General , of counsel; Mr. Zweig, on the briefs).

Ellen D. Julis, Assistant County Counsel, argued the cause for respondent Bergen County in A-3660:3636:3639-98T2 (Murshell J. Bland, County Counsel, attorney; Ms. Julis, on the briefs).

Carol I Cohen, Union County Counsel, attorney for amicus curiae Union County in A-3630:3636:3639-98T2 (Jason W. Rockwell, on the briefs).

PER CURIAM

International Fidelity Insurance (IFI), a corporate surety which posted bonds pursuant to R. 3:26-4 to insure five defendants' presence at all stages of criminal proceedings against those defendants, appeals from five forfeiture judgments entered pursuant to R. 3:26-6 after each of the defendants did not appear as required.[1] IFI acknowledges it has no idea as to the whereabouts of the respective defendants.

IFI argues multifaceted grounds for overturning the judgments. Pared to their essence, the grounds are that the trial courts

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[1] We have consolidated these appeals for this opinion.

improperly entered the forfeiture judgments because R. 3:26-6:

a. provides for bail forfeiture without notice of motion brought by the prosecutor, and an offer of proof in violation in due process;

b. transforms the role of the court into that of the prosecutor by allowing entry of a default judgment on the court's own motion, in violation of due process and separation of powers; and

c. establishes substantive law in violation of separation of powers.

We reject the contentions and affirm each of the forfeiture judgments under appeal.

I

Rule 3:26 provides the criteria for setting bail for defendants prior to conviction. It authorizes the posting of recognizances in the form of corporate surety bonds. R. 3:26-4. Each recognizance posted by a corporate surety "shall contain the terms set forth in R. 1:13-3(b) and shall be conditioned upon the defendant's appearance at all stages of the proceedings until final determination of the matter, unless otherwise ordered by the court." R. 1:13-3(b) requires that any bond posted contain a provision the bond may be enforced by summary proceeding.

The specific summary proceeding regulating bail bonds is prescribed by R. 3:26-6 entitled "Forfeiture."

(a) Declaration; Notice. Upon breach of a condition of a recognizance, the court on its own motion shall order forfeiture of the

> bail, and the criminal division manager shall forthwith send notice of the forfeiture to the county counsel, defendant, and the surety. The notice shall direct that judgment will be entered as to any outstanding bail absent a written objection seeking to set aside the forfeiture, which must be filed within 45 days of the date of the notice.
>
> (b) Setting Aside. The court may direct that a forfeiture be set aside if its enforcement is not required in the interest of justice upon such conditions as it imposes.
>
> (c) Enforcement; Remission. When a forfeiture is not set aside or satisfied, the court shall, upon expiration of the 45 days provided for in paragraph (a), summarily enter a judgment of default for any outstanding bail and execution may issue thereon. After entry of such judgment, the court may remit it in whole or in part in the interest of justice. In any contested proceeding, county counsel shall appear on behalf of the government. County counsel shall be responsible for collection of forfeited amounts.

The procedure authorizing the court, on its own motion, to enter an order of forfeiture and directing the criminal division manager to give notice of forfeiture to the surety stemmed from recommendations of a Bail Forfeiture Committee appointed to review bail forfeiture procedures in order to recommend changes and improvements as part of the judicial unification of the trial courts. The Committee

recommended streamlining of the notice of forfeiture process. That recommendation changed the bail forfeiture process to the current "on the court's own motion" from one that could only be precipitated by a motion of the prosecuting attorney. See Pressler, Current N.J. Court Rules, comment on R. 3:26-6 (1998).

II

The events giving rise to the five appeals were essentially identical.

On March 17, 1997, IFI posted a $10,000 bond guaranteeing Dennis Kasey's appearance on a complaint for possession of a controlled dangerous substance and for manufacture and distribution of heroin and cocaine. On October 3, 1997, IFI posted a $10,000 bond guaranteeing Valeria Rodriguez's appearance on a complaint of receiving stolen property. On May 2, 1998, IFI posted a $100,000 bond guaranteeing Roni Polanca's appearance on a complaint for possession of cocaine with intent to distribute. On April 10, 1998, IFI posted a $100,000 bond guaranteeing Jose Rodriguez's appearance on complaints for possession and distribution of a controlled dangerous substance in a school zone. On July 4, 1998, IFI posted a $7,500 bond guaranteeing Fidel Bravo's appearance on complaints for possession of cocaine with intent to distribute, possession of marijuana, possession of narcotics paraphernalia, and being under the influence of a controlled dangerous substance. The bonds posted were identical in their general terms and conditions. Each was in a form required by R.

1:13-3 (b) and conditioned as required by R. 3:26-4. All defendants failed to appear.

Upon those failures, the affected courts followed the procedure delineated by R. 3:26-6. The courts ordered bail forfeiture after entry of an arrest warrant. The criminal case managers gave notice to county counsel and the surety. The Notices of Bail Forfeiture for Surety all recited that the defendant had failed to appear in court and that the trial court had ordered arrest and forfeiture of bail. The notices then provided:

> Unless you proceed to have the forfeiture set aside within 45 calendar days of the date of this notice, default judgment will be entered for the full amount posted.
>
> You can contact the Criminal Division Manager's Office to: 1) express your desire for a hearing before the judge, which will require you to file a written notice of objection to the bail forfeiture (forms are available in the Criminal Division Manager's Office); 2) arrange to return the defendant to custody.

The notices also provided an address, a contact phone number, hours within which to call, and names of individuals to contact.

In each instance IFI responded by filing motions. All essentially opposed entry of a default judgment and sought an extension of time within which to surrender the defendant. In support of their motions, IFI counsel submitted his certification in which he outlined the process IFI utilizes to keep track of its defendants and the efforts it makes after losing

contact with the defendant. The certification is not based on personal knowledge. Consequently, the representations contained in it are inadmissible hearsay. See R. 1:6-6; Sellers v. Schonfeld, 270 N.J. Super. 424 (App. Div. 1993).

In each instance, the court denied IFI's motion and entered a default judgment. These appeals are ensued.

III

IFI contends the procedure set forth in R. 3:26-6 for forfeiture of bail violates its right to procedural due process because it 1) provides that the court, on its own motion, shall order the forfeiture; 2) fails to require notice to the bonding company of the time and place that a judgment was entered; and 3) provides for a summary proceeding without any offer of proof. We conclude the rule satisfies the requirements of procedural due process.

Procedural due process requires notice and an opportunity to be heard. Mettinger v. Globe Slicing Machine Co., 153 N.J. 371, 389 (1998); see also Doe v. Poritz, 142 N.J. 1, 106 (1995). "Due process is not a fixed concept...but a flexible one that depends on the particular circumstances." Doe v. Poritz, supra, 142 N.J. at 106. "Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner." Ibid. "The minimum requirements of due process, therefore, are notice and the opportunity to be heard." Ibid.

As the late Chief Justice Wilentz articulated in Doe v. Poritz,

> To determine what procedural protections are required in a given case, we must weigh the following factors:
> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.
> [Id. At 106-07 (citations omitted).]

These procedural protections were first enumerated in Matthews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L.Ed. 2d 18, 33 (1976), where the United States Supreme Court held a recipient of Social Security disability benefits was not entitled to a hearing prior to termination of the benefits. The application of Matthews criteria has generally led courts to require some kind of hearing before a person is deprived of liberty or property, but some circumstances have found a post-deprivation hearing consistent with due process. See Zinermon v. Burch, 494 U.S. 113, 127-28, 110 S. Ct. 975, 984-85, 108 L. Ed. 2d 100, 115 (1990). Viewed in the context of these principles, we conclude R. 3:36-6 satisfies the requirements of procedural due process.

There can be no dispute here that a corporate surety, like IFI, is entitled to both a pre-deprivation hearing and post-deprivation hearing under the rule. On the one hand, it is

given notice that a forfeiture has been declared due to failure to present the defendant at a stage of the criminal proceedings covered by its bond. At that point, it has been deprived of no property. On the other hand, even after the default forfeiture judgment is entered, a point at which it is subject to the potential loss of property, it has an opportunity for a hearing to secure a remission of its obligation and, consequently, a vacation of any default judgment. Thus, the rule affords avenues which engender prevention of wrongful deprivation. See Fusari v. Steinberg, 419 U.S. 379, 389, 95 S. Ct. 533, 539, 42 L. Ed. 2d 521, 529 (1975). Quite obviously, both the pre-and the post-deprivation hearings afford the surety the right to be exonerated if it produces or has produced the defendant as required by its bond. To that degree, there can be no dispute the rule affords a bond surety an opportunity to be heard at a meaningful time and in a meaningful manner. The rule consequently meets the minimum requirements of due process because it affords both notice and a reasonable and continuing opportunity to be heard.

The Matthews factors demonstrate procedural protections are afforded. The private interest affected by the forfeiture judgments is one engaged in for economic advantage; one that involved a known business risk. The surety obligated itself to guarantee the presence of a defendant at a criminal proceeding for economic gain – the premium paid for by the bond. It also did so with a right against a third person for indemnification of costs incurred if it forfeited on any bond for failure to meet its contractual

guarantee. At the same time, the surety issued the surety bonds knowing that R. 3:26-6 was integral facet of the undertaking assumed and, at the same time, agreed judgment could be entered in a summary proceeding. In essence, the surety knowingly agreed to the provisions of the rules when it proffered the bonds at issue. When these circumstances are considered in the context of the element of injury to the public interest that results in every case where a defendant deliberately fails to make an appearance in a criminal case, there is no compelling basis to require anything more than the requirements of due process afforded by R. 3:26-6. See, e.g., State v. Peace, 63 N.J. 127, 129 (1973).

Matthews' second factor fosters no justification for a conclusion there is either a risk of erroneous deprivation if the rule dictates are followed or that any additional safeguards are necessary. The risk of any erroneous deprivation is protected against by both pre- and post-default judgment opportunities to be heard. It cannot be seriously argued that the rule's built-in safeguards can be better designed to avoid risk of erroneous determinations on the surety's guarantee. Consequently, no additional safeguards are required to satisfy constitutional dictates.

Finally, in striking the appropriate due process balance, the last factor to be assessed is consideration of the government's burden, which includes the fiscal and administrative burdens that another administrative process would engender. We need go no further than to refer to the Bail Forfeiture Committee report for support

of the conclusion that the current provisions of R. 3:26-6 alleviate the substantial governmental, fiscal, and administrative burdens that were created by the former practice, which IFI now essentially advocates should be reinstated. Rather than reiterate the report's support for our conclusion, we incorporate the report by reference. Viewed in context of the necessary alleviation of the burden espoused by the report and reflected in R. 3:26-6, we conclude the rule strikes the appropriate due process balance.

All of IFI's remaining contentions we find to be clearly without merit, so that discussion in this written opinion is unwarranted. R. 2:11-3(e)1(E).

The five judgments under appeal are affirmed.

APPENDIX B

SUPREME COURT OF NEW JERSEY
C-217 September Term 2000
49,979

STATE OF NEW JERSEY
(COUNTY OF BERGEN),
Plaintiff-Respondent,

ON PETITION FOR CERTIFICATION

v.

RONI POLANCA, et al.,
Defendants,

FILED 10/18/2000

and

INTERNATIONAL FIDELITY
INSURANCE COMPANY, as Surety,
Defendant-Appellants.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3630/3636/3775/4007-98 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 17th day of October, 2000.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX C

SUPREME COURT OF NEW JERSEY
M-543 September Term 2000
49,979

STATE OF NEW JERSEY
(COUNTY OF BERGEN),
Plaintiff,

ORDER

v.

RONI POLANCA, et al.,
Defendants,

FILED 1/10/2001

and

INTERNATIONAL FIDELITY
INSURANCE COMPANY, as Surety,
Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 9th day of January 2001.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT